Supreme Court, U.S.
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No. 09-577 NOV 6 - 2009

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In The

Supreme Court of the United States

MARY HALE, ET AL.,

Petitioners,

v.

BEXAR COUNTY, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 6, 2009

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QUESTIONS PRESENTED

Whether the Fifth Circuit decision to deny Mary and Wayne Hale's First and Fourteenth Amendment claims under the state-created danger theory is out of step with the other circuits on this issue so as to create a meaningful circuit split worthy of granting certiorari.

Whether the Fifth Circuit refusal to acknowledge the state-created danger doctrine abnegates the constitutional protection of a person's right to bodily integrity under *DeShaney*.

Whether the Fifth Circuit denial of Jennifer Harris', Harold Harris' and Darrell Scraper's claims regarding a right to rescue persons in distress violated their fundamental liberty interests under the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

The following Plaintiffs (now Petitioners herein) asserted claims in the trial court below:

MARY HALE,
WAYNE HALE,
JENNIFER HARRIS,
HAROLD HARRIS, and
DARRELL SCRAPER

The following party was Defendant in the trial court below and is Respondent herein:

BEXAR COUNTY, TEXAS

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the Fifth Circuit was entered on July 27, 2009 and was not published, and is attached to the Appendix hereto as App. 1-12. It is hereafter referred to as the Opinion below. Appellants' motion for rehearing en banc was denied on August 24, 2009.

JURISDICTION

The judgment of the Fifth Circuit was entered on July 27, 2009. Motion for rehearing was denied on August 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America Amendment 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such office's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Introduction

This case involves the failure or refusal of the trial court and the Fifth Circuit to accurately and adequately address First and Fourteenth Amendment claims against arbitrary and unreasonable law enforcement interference with volunteer rescue attempts to protect the bodily integrity of Petitioners Mary and Wayne Hale and free them from unnecessarily prolonged life-threatening exposure to chlorine gas from a train wreck near their home in June, 2004. The Fifth Circuit's decision is out of step with the other circuits on this issue so as to create a meaningful circuit split worthy of granting certiorari. Furthermore, the Fifth Circuit's refusal to acknowledge the state-created danger doctrine is an abnegation of *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989), while the other circuits allow meaningful protection of a person's right to bodily integrity against arbitrary and unreasonable governmental action.

The undisputed facts of the case show that the Hales could have been rescued by volunteers within about two hours of the train wreck if not stopped by County deputies. However, the Hales were severely injured as a result of prolonged exposure to toxic gases for about four hours longer than necessary after the County prevented early rescue attempts by volunteer firemen. Although County officials did not cause the train wreck, their actions preventing timely rescue attempts without providing an adequate

alternative were a producing cause of the Hales' injuries. The Plaintiffs, two elderly residents and three County rescue personnel, asserted claims under 42 U.S.C. § 1983 in a complaint filed in federal district court in the Western District of Texas.

The Hales asserted claims for violations of constitutionally protected rights to bodily integrity pursuant to the Due Process Clause of the Fourteenth Amendment under a state-created danger theory of liability against the County. Their claims are predicated on knowing and affirmative official actions preventing early rescue of trapped residents without providing an adequate alternative. The Plaintiffs argued that the affirmative conduct by County officials preventing volunteers from rescuing trapped residents increased and prolonged the harm and injuries to the Hales that they would not otherwise have suffered.

The volunteer fire/rescue personnel asserted claims for violations of their constitutionally protected fundamental rights to rescue the Hales and other residents without arbitrary and unreasonable interference by law enforcement officers. The trial court and the Fifth Circuit failed to adequately address their claims as liberty interests.

Factual Background

This § 1983 case arises out of adverse actions under color of state law pursuant to official policy, practice or decision of Bexar County, Texas including

the Bexar County Fire Marshal and Sheriff officials, which proximately caused the Hales to suffer otherwise avoidable harm and injuries due to prolonged exposure to toxic, life-threatening chlorine gas associated with a catastrophic train wreck.

At the time sheriff deputies first prevented initial attempts by volunteer fire/rescue personnel including Lt. Harris and Capt. Nolen from rescuing the Hales at about 7:00 a.m., City of San Antonio HazMat teams were not on the scene and would not begin arriving until about 8:30 a.m. to prepare for a 9:45 a.m. tactical entry. So, when the County deputies stopped the volunteers from bringing rescue vehicles and equipment to the Hales' residence, County officials knew the Hales were in mortal danger and city rescue teams would not be available for hours. The Hales suffered severe physical and mental harm and injuries during the extra hours they waited to be rescued, and they could have died. Their relatives, who lived next door, did die.

The uncontroverted evidence in the record shows that volunteer personnel could have rescued the Hales by as early as 7:30 a.m. utilizing all-terrain vehicles and mobile equipment if they had not been stopped by sheriff deputies. County officials had made the official decision to cordon off the area of the train wreck and prevent anybody except city fire/rescue personnel from approaching the scene. This overt action by the County caused the Hales to suffer life-threatening exposure to toxic gases for about four hours longer than necessary and limited the Hales'

hope of survival to their prospective rescue by the city fire department, which had not yet committed any rescue teams, did not have all-terrain equipment or tools, and was not prepared to make tactical entries on foot in teams of two persons until about 9:45 a.m.

The Hales were not rescued until about 11:30 a.m., by which time they had endured nearly 7 hours of excruciating, life-threatening exposure to chlorine gas. The County knew that the Hales were trapped in their house, which became a lethal gas chamber filled with chlorine gas and hydrochloric acid, after the County advised them to shelter in place, turn off their air conditioners, and turn on the shower for decontamination at about 9:00 a.m.

The Hales would not have been trapped in their house and exposed to such gas chamber conditions, if the County had not stopped volunteers from rescuing them at 7:00 a.m. Therefore, the County's decision to wait for the city to come to the rescue certainly cut short the Hales' life expectancy due to permanent physical injuries.

The County increased and prolonged the life-threatening danger to the Hales and made them more vulnerable to have their lives cut short by advising them to shelter in place under lethal toxic conditions, after they were too weak and exhausted to try to escape. The County also prevented available rescue by on-the-scene crews and private parties, when County officials knew the Hales were succumbing to toxic life-threatening exposure.

County officials also interfered with the volunteer's rights to bring rescue vehicles and equipment to the Hales' aid. Such interference by sheriff deputies was arbitrary and unreasonable because they were acting outside their lawful authority under Texas law and local regulations. The volunteers claim a constitutionally protected fundamental right to rescue persons in distress including the Hales without arbitrary and unreasonable interference by law enforcement personnel.

Jennifer Harris, Harold Harris and Darrell Scraper claim First and Fourteenth Amendment rights and liberty to associate with a volunteer fire department, and to be treated the same as paid fire/rescue personnel. They also claim rights and liberty to do their jobs without arbitrary and unreasonable interference by law enforcement officers. Jennifer Harris is claiming damages for being prevented from going to the rescue of the Hales and others.

Procedural Background

Plaintiffs filed their complaint seeking damages for injuries caused by prolonged exposure to toxic gases due to a train wreck and County officials' conduct, which unreasonably and unnecessarily prolonged life-threatening exposure. The Hales allege violations of their fundamental right to bodily integrity, when County deputies prevented volunteer rescuers from saving trapped residents in peril of their lives. Additionally and alternatively, the Hales

allege a remedy under the state-created danger theory. The volunteer fire/rescue parties allege violations of their fundamental rights to rescue persons in distress without arbitrary and unreasonable interference from law enforcement personnel. They also alleged an equal protection claim based on their volunteer status compared to paid city fire/rescue personnel.

The Hon. Royal Furgeson of the district court for the Western District of Texas dismissed Plaintiffs' claims against the individual defendant pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief could be granted. Although the district court refused to dismiss Plaintiffs' claims against the County pursuant to FED. R. CIV. P. 12(b)(6), it subsequently granted summary judgment citing its earlier ruling on the individual defendant's motion for dismissal, finding that because there was no constitutional violation or deprivation of a federal right, Bexar County could not be held liable under section 1983.

The Plaintiffs appealed and the Fifth Circuit affirmed the district court's dismissal of the actions, holding although the Plaintiffs had urged their section 1983 claim under the state-created danger theory.

"[T]his Circuit has never expressly accepted the state-created danger theory that a due process violation can be found if a state created or increased the danger to the plaintiffs and acted with deliberate

indifference." *Rios v. City of Del Rio,* 444 F.3d 417, 422-23 (5th Cir. 2006) ("[N]either the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder."); *see also Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability"); *Morin v. Moore,* 309 F.3d 316, 321-24 (5th Cir. 2002); *McKinney v. Irving Indep. Sch. Dist.,* 309 F.3d 308, 313-14 (5th Cir. 2002).

REASONS FOR GRANTING THE PETITION

The first reason for granting the petition is to prevent the abnegation of the constitutionally protected fundamental right to bodily integrity in circumstances, where as here the government arbitrarily and unreasonably prolonged a person's life-threatening exposure to toxic gases by preventing volunteer rescue attempts without providing an adequate alternative. The Fifth Circuit's opinion is out of step with the other circuits on this issue so as to create a meaningful circuit split worthy of granting certiorari. The second reason for granting the petition is that the Fifth Circuit's refusal to acknowledge the state-created danger doctrine abnegates the constitutional protection of a person's right to bodily integrity under *DeShaney.*

In 1989, this Court decided *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989). *DeShaney* affirmed that in certain limited circumstances, the United States Constitution imposes on the state affirmative duties of care and protection. *DeShaney,* 489 U.S. at 198. According to many subsequent opinions, one such limited circumstance arises when the state exposes a person to a danger of its own creation or when the state prolongs or increases a person's vulnerability to already existing dangerous circumstances.

DeShaney is commonly cited as the basis for the development of the state-created danger theory. *McClendon v. City of Columbia,* 305 F.3d 314 (5th Cir. 2002); *Kneipp v. Tedder,* 95 F.3d 1199, 1205 (3d Cir. 1996); *Uhlrig v. Harder,* 64 F.3d 567, 572 n.7 (10th Cir. 1995).

In the twenty years since *DeShaney,* courts in every federal circuit except the Fifth Circuit have adopted some version of the state-created danger doctrine. There have been hundreds of federal cases involving state-created danger issues, yet this Court has not addressed the issue despite conflicting opinions among the various circuits. As a proximate result, each of the circuits has adopted different criteria for application of the state-created danger theory, and the Fifth Circuit continues to deny relief stating in its opinion below that "[N]either the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however,

many times refused to allow recovery sought to be predicated thereunder." *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 422-23 (5th Cir. 2006).

I. The origins of the state-created danger theory.

Although this Court's holding in *DeShaney* is commonly cited as the genesis of the state-created danger theory, several circuits had already recognized the state-created danger theory in some form before 1989. *See Wells v. Walker,* 852 F.2d 368, 370-71 (8th Cir. 1988); *Escamilla v. City of Santa Ana,* 796 F.2d 266, 269 (9th Cir. 1986); *Estate of Gilmore v. Buckley,* 787 F.2d 714, 722 (1st Cir. 1986); *Jones v. Phyfer,* 761 F.2d 642, 646 (11th Cir. 1985); *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982).

The pre-*DeShaney* development of state-created danger is discussed in David Pruessner, *The Forgotten Foundation of State-Created Danger Claims,* 20 REV. LITIG. 357, 359-61 (2001). Pruessner discusses the so-called "snake pit" cases – a name derived from a quote by Justice Posner in *Bowers v. DeVito,* 686 F.2d 616 (7th Cir. 1982):

> If the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. at 618.

A. Development of the state-created danger after *DeShaney*

After this Court's opinion in *DeShaney,* all but one of the federal circuit courts adopted some form of the state-created danger theory, and applied the theory to various fact situations. Without recognition of this theory of liability, the following cases would have been decided differently and fundamental rights would have been constitutionally unprotected:

9th Circuit *Wood v. Ostrander,* 879 F.2d 583, 590 (9th Cir. 1989) (adopting the state-created danger theory in the context of a § 1983 claim brought against police officers by the passenger of an impounded vehicle who, in 1984, was raped after officers allegedly abandoned her on the side of the road);

11th Circuit *Cornelius v. Town of Highland Lake,* 880 F.2d 348, 356 (11th Cir. 1989) (overruled on other grounds by *White v. Lemacks,* 183 F.3d 1253, 1256 (11th Cir. 1999)) (adopting the state-created danger theory in the context of a § 1983 claim brought against town and prison officials by a town clerk who, in 1985, was abducted and terrorized by prison inmates assigned to a community work program);

8th Circuit *Freeman v. Ferguson,* 911 F.2d 52, 54-55 (8th Cir. 1990) (adopting the state-created danger theory in the context of a § 1983 claim brought on behalf of a woman killed by her estranged husband against a police chief

who allegedly directed his officers to ignore her pleas for police assistance);

2nd Circuit *Dwares v. City of New York,* 985 F.2d 94, 98-99 (2d Cir. 1993) (adopting the state-created danger theory in the context of a § 1983 claim brought by demonstrators against police officers who allegedly conspired to permit a group of "skinheads" to assault the demonstrators with impunity during a July 4, 1989 flag burning event);

7th Circuit *Reed v. Gardner,* 986 F.2d 1122, 1125 (7th Cir. 1993) (adopting the state-created danger theory in the context of a § 1983 claim brought by motorists who were injured in a September 1988 automobile collision with an allegedly drunk driver against police officers who had previously failed to arrest the driver);

10th Circuit *Uhlrig v. Harder,* 64 F.3d 567, 572 (10th Cir. 1995) (accepting the state-created danger theory, but rejecting a § 1983 claim brought against state mental health officials on behalf of an activity therapist who was killed by a mental hospital patient);

4th Circuit *Pinder v. Johnson,* 54 F.3d 1169, 1175 (4th Cir. 1995) (*en banc*), *cert. denied,* 516 U.S. 994 (1995) (considering, but not recognizing a state-created danger claim and noting that there may be some "point on the spectrum between action and inaction" in which the state would be implicated in the harm caused by third parties);

3rd Circuit *Kneipp v. Tedder,* 95 F.3d 1199, 1201, 1208 (3d Cir. 1996) (adopting the state-created danger theory in the context of a § 1983 claim brought against a city and police officers on behalf of a woman who suffered brain damage in January 1993 when the officers allegedly left her alone to walk home on a cold night while she was intoxicated);

1st Circuit *Frances-Colon v. Ramirez,* 107 F.3d 62, 63-64 (1st Cir. 1997) (declining to adopt but holding that a substantive due process interest in "bodily integrity" can support a personal injury claim under § 1983 in the rare and exceptional cases when a government employee affirmatively acts to increase the threat of harm to the claimant); *see also Rodriguez-Cirilo v. Garcia,* 115 F.3d 50 (1st Cir. 1997);

6th Circuit *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066-67 (6th Cir. 1998) (adopting the state-created danger theory in the context of a § 1983 claim brought by undercover police officers alleging that city officials released personal information from their personnel files to the drug conspirators that the officers were investigating);

D.C. Circuit *Butera v. District of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001) (adopting the state-created danger theory, but rejecting a § 1983 claim brought against a police department and individual officers on behalf of an individual who was shot while working as an undercover operative for the department).

All circuit courts except the Fifth Circuit have recognized and adopted some form of state-created danger theory of liability. *See Butera v. District of Columbia,* 235 F.3d 637, 648-49 n.10 (D.C. Cir. 2001) (collecting cases from each of the circuits discussing the state-created danger theory).

B. The state-created danger theory remains an academic issue in the Fifth Circuit

Although the Fifth Circuit has recognized the due process "right to be free of state-occasioned damage to a person's bodily integrity", *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 450-51 (5th Cir. 1994) (en banc), it never embraced the state-created danger doctrine. Beginning seventeen years ago the circuit court began to discuss the theory and to outline the elements of the doctrine. The circuit court acknowledged *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992) that the doctrine had been adopted in sister circuits, and defined the elements of the doctrine in the Fifth Circuit for purposes of appellate review. The Fifth Circuit, however, stopped short of adopting the theory.

Notable cases included: *Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 530 (5th Cir. 1994) ("we have found no cases in our circuit permitting § 1983 recovery for a substantive due process violation predicated on a state-created danger theory"); *Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198, 201 (5th Cir. 1994) ("no Fifth Circuit case has yet predicated relief

on a state created danger theory"); *Randolph v. Cervantes,* 130 F.3d 727, 731 (5th Cir. 1997) ("the state-created danger theory has not been adopted in this Circuit"); *Piotrowski v. City of Houston,* 237 F.3d 567, 584 (5th Cir. 2001) ("although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory").

C. The Fifth Circuit *McClendon* Opinions: *McClendon I*

The Fifth Circuit almost recognized and adopted the state-created danger doctrine in *McClendon v. City of Columbia,* 258 F.3d 432 (5th Cir. 2001), *vacated & reh'g granted en banc,* 285 F.3d 1078 (5th Cir. 2002) ("*McClendon I*"). In *McClendon,* a police officer loaned a gun to a police informant to protect himself from likely harm from McClendon, the man against whom he had informed. The informant then used the gun to shoot McClendon in the face, permanently blinding him. *McClendon I,* 258 F.3d at 434-38.

The district court for the Southern District of Texas dismissed the case on the grounds that the Fifth Circuit had not adopted the state-created danger doctrine and that even if the doctrine applied, its parameters were not clearly established at the time of the shooting – July 1993. On appeal, the initial panel unanimously disagreed.

Judge Politz discussed the development of the state-created doctrine, both outside the Fifth Circuit and through references in cases within the Circuit. The court held that under the facts, McClendon established a right to relief under the state-created danger doctrine, and that the individual police officer was not entitled to qualified immunity because the application of the state-created danger theory was clearly established by July, 1993. *Id.* at 438-41. However, the *McClendon I* panel opinion was short-lived.

McClendon II

The *McClendon I* defendants moved for rehearing *en banc*, which the Fifth Circuit granted. The panel opinion was ultimately withdrawn and a per curium opinion, *McClendon II,* 285 F.3d 1078 (5th Cir. 2002), was handed down by a divided court. In *McClendon II,* the *en banc* court neither explicitly adopted nor rejected the state-created danger doctrine. Instead, it held that the factual circumstances in the case were insufficient to reach the level necessary to invoke the doctrine. Essentially, it made a non-decision.

Judge Parker, writing in dissent joined by Judges Wiener and DeMoss, noted the majority's unwillingness to take a definitive position on state-created danger, asserting that their action "cannot be defended and leaves this area of circuit law in a perpetual state of confusion." *Id.* at 334. Parker goes on, "In refusing to make this decision, the majority attempts to create the illusion that no Circuit split

exists in hopes of avoiding Supreme Court scrutiny." *Id.* at 338 n.10. Parker's plea to the majority fell on deaf ears in *McClendon II,* as the majority of the justices refused to clarify the Circuit's stance on state-created danger.

D. Post-*McClendon*

Following the Fifth Circuit's *en banc* reverse course in *McClendon II,* the court continued to review state-created danger cases. In *Morin v. Moore,* 309 F.3d 316 (5th Cir. 2002), the Fifth Circuit wrote of their holding in *McClendon II,* "we neither adopted nor rejected the state created danger theory." *Id.* at 321. The court expressly stated that "this Court had *recognized* but never *adopted* the state-created danger theory." *Id.* (emphasis added).

In *McKinney v. Irving Independent School District,* 309 F.3d 308 (5th Cir. 2002), handed down at the same time as *Morin,* the court again stated: "this Court had *recognized* but never *adopted* the state-created danger theory." *Id.* at 313 (emphasis added).

In August 2003, the Fifth Circuit released its opinion in *Scanlan v. Texas A&M University,* 343 F.3d 533 (5th Cir. 2003), holding that the Petitioners herein adequately "stated a section 1983 claim under the state-created danger theory." *Id.* at 538 (App. 40).

But by November 2003, the Fifth Circuit again retreated. In *Rivera v. Houston Independent School District,* 349 F.3d 244 (5th Cir. 2003), the court

reviewed on appeal a trial court's dismissal of a state-created danger claim. In *Rivera,* the parents of a middle school student sued the school board for failing to protect their son from gang violence at the school. The court's earlier "recognized but never adopted" language was replaced with this statement:

> we have *never recognized* state-created danger as a trigger of State affirmative duties under the Due Process Clause.

Id. at 249 (emphasis added).

The following year, the court again addressed the state-created danger theory in *Beltran v. City of El Paso,* 367 F.3d 299 (5th Cir. 2004), a claim arising from a "911" operator's alleged failure to properly dispatch police units, resulting in the deaths of two individuals. The court couched the history of the state-created danger doctrine as follows:

> this court has consistently *refused to recognize* a 'state-created danger' theory of § 1983 liability.

Id. at 307 (emphasis added).

In March 2006, the Fifth Circuit released its opinion in *Rios v. City of Del Rio,* 444 F.3d 417 (5th Cir. 2006). In *Rios,* the plaintiff, a U.S. Customs officer, sought recovery for damages he sustained when struck by a police vehicle driven by an escaping prisoner. He asserted claims under the state-created danger doctrine against the police chief and officer,

who unsuccessfully moved for dismissal under FED. R. CIV. P. 12(b)(6).

The Fifth Circuit reversed and dismissed the claims, stating:

> . . . this court has frequently spoken of the "state-created danger" theory, and has discussed its various permutations and requirements as applied in other circuits, but neither the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder.

Id. at 422.

II. The Opinion below misconstrues the Fifth Circuit's prior opinion in *Salas v. Carpenter* and fails to determine the distinguishing facts of this case.

The Opinion below begins its analysis with *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), stating "*Salas* 'did not address the viability of the state-created danger theory or define the contours of an individual's right to be free from state-created dangers.'" (App. 24) *quoting McClendon v. City of Columbia,* 305 F.3d 314, 330 (5th Cir. 2002).

The *Salas* court stated:

> If the state actor has a requisite mental state, a due process deprivation could occur

> under two sets of circumstances. First, a procedural or substantive due process violation could occur if a state official causes injury by arbitrarily abusing governmental power. Second, a substantive due process violation could occur if uncommon circumstances create a duty for the state to protect a particular person. . . .
>
> We have held that a constitutional deprivation can result from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g., deliberate (or conscious) indifference, recklessness, or gross negligence."

Salas, 980 F.2d at 307.

The *Salas* court further noted that other circuits found a denial of due process when the state creates the faced dangers. The *Salas* court did not reject the doctrine as unsound, but rather found that the officer in that case had not increased the plaintiff's "vulnerability to danger in the sense envisioned by the Court in *DeShaney*." *Id.* at 309.

Appellants request a writ of certiorari because the proceeding involves one or more questions of exceptional importance including issues relating to Fourteenth Amendment substantive due process and the state-created danger theory on which the panel decision conflicts with the authoritative decisions of this circuit and other United States Courts of Appeals that have addressed the issue. The Appellants submit that the United States Court of Appeals for the 7th Circuit would have reached a different result based

on the holdings in *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990); *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); and *Jackson v. Byrne*, 738 F.2d 1443 (7th Cir. 1984), holding that the state cannot arbitrarily assert its power so as to cut short a person's life. *Ross v. United States*, 910 F.2d at 1433. Appellants also submit that the panel decision is contrary to this circuit's precedent. *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992); *Morin v. Moore*, 309 F.3d 316, 321-24 (5th Cir. 2002). Appellants also submit that the panel did not apply the proper standard of review to the firefighters' claims, which were dismissed under FED. R. CIV. P., Rule 12(b)(6), not summary judgment.

CONCLUSION

The County officials' conduct violated the Hales' rights to bodily integrity as protected by the state-created danger theory regardless of how the contours of the right are framed. In other words, had sheriff deputies stopped volunteers from rescuing train wreck victims without providing an adequate alternative in the Eighth Circuit or the Eleventh Circuit or any of the other federal circuits, the elements of the state-created danger theory, as it existed at the time in each circuit, would have given rise to liability on the part of the County officials.

A majority of federal circuits have approved of the state-created danger theory in a general sense. Although there may not be a consensus among those

courts as to the contours of the underlying substantive due process right, there is a general consensus that the doctrine provides a viable theory of liability. The Opinion below, however, failed to recognize that under any formula of the theory, the Hales stated a constitutionally protected right or the County officials' conduct was unlawful.

Regardless of the emerging contours of the state-created danger theory in other circuits, the Fifth Circuit continues to refrain from accepting or rejecting the doctrine. Considering this Court's statements in *DeShaney* and the prevailing law across the nation, it is apparent that the County officials' conduct, as alleged in the Plaintiffs' Complaint, was unlawful.

Respectfully submitted,

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Attorney for Petitioners
Mary Hale, Wayne Hale,
Jennifer Harris, Harold
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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-50820

MARY HALE; WAYNE HALE;
JENNIFER HARRIS; HAROLD HARRIS;
DARRELL SCRAPER

Plaintiffs-Appellants

v.

BEXAR COUNTY, TEXAS

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:06-CV-0562

(Filed Jul. 27, 2009)

Before REAVLEY, DAVIS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

This is an appeal from a summary judgment granted in favor of Appellee Bexar County in a suit

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* Pursuant to 5TH CIR. R 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

stemming from a train derailment and related events that resulted in the death and injury of residents in the nearby area. Appellants – Wayne and Mary Hale (the "Hales"), residents of the area in which the train derailed, and Darrell Scraper, Harold Harris, and Jennifer Harris, members of the Southwest Volunteer Fire Department ("SWFD") – sued Bexar County and Bexar County Sheriff's Office Lieutenant Kyle Coleman ("Lt. Coleman") under 42 U.S.C. § 1983, alleging that they prevented attempted rescue efforts by volunteer rescuers which could have limited the Hales' injuries related to the train derailment. Appellants appeal the district court's grant of summary judgment in favor of Bexar County. For the following reasons, we affirm the judgment of the district court.

I.

On June 28, 2004, a train carrying chlorine gas derailed near the Hales' home of in Bexar County, outside of the city of San Antonio. The train derailment was within two-hundred yards of the home. The Hales were awakened by the sound of the derailment and the smell of the concentrated chlorine gas. Mary Hale reported the crash to a Bexar County 911 operator, who notified the Southwest Volunteer Fire Department. The incident was within the jurisdiction of SWFD and outside the city limits of the City of San Antonio. Plaintiffs Harold and Jennifer Harris, in their capacities as assistant chief and lieutenant of the SWFD, were dispatched to the scene. The Harrises reached the scene at 5:15 a.m., followed by

deputies from the Bexar County Sheriff's Office ("BCSO") and SWFD Chief Darrell Scraper.

As they approached the scene, a BCSO patrol unit and a SWFD motor unit drove into a cloud of chlorine gas. The gas was leaking from a ruptured tank car on the train. The two lead vehicles were overcome by the chlorine gas. The sheriff's deputy was able to back his vehicle out and escape, but an injured firefighter became incapacitated and was rescued by SWFD Chief Harris. After the injured firefighter was transported for medical treatment, the SWFD rescuers put on their bunker gear and self-contained breathing apparatuses, which provided limited protection from the leaking chlorine gas, and returned to the scene. Within an hour of the derailment, the Bexar County dispatcher advised SWFD and BCSO of the chlorine gas and the wind direction. A BCSO sergeant instructed all BCSO units to stay clear of the scene.

At 6:00 a.m., Mary Hale made another call to 911, reporting that she, her husband, and her brother-in-law were having serious trouble breathing and were attempting to evacuate in their vehicle. Mary Hale informed dispatch that their access to the road was blocked by a neighbor's locked gate, which prevented them from driving their vehicle or walking to evacuate the area.

SWFD Chief Scraper arrived at the scene around 6:00 a.m. and established a forward command position, while Chief Harris retained his authority as

incident commander. San Antonio Fire Department ("SAFD") personnel began arriving on the scene and were briefed by SWFD. Around 6:15 a.m. Harris and SWFD Capt. Nolen found and rescued the train engineer, carried him east away from the wreckage for about ten minutes, and waited for a SWFD rescue vehicle. The two rescuers, still in their bunker gear, returned to the wreckage to search for the missing train conductor.

Around 6:30 a.m., SWFD was notified that nearby residents, including the Hales, were trapped at 9281 Nelson Road. SAFD and SWFD discussed options for rescuing the Hales and SWFD, equipped with bunker gear and self-contained breathing apparatuses, prepared to approach the Hales' residence through a cornfield upwind from the spill. At 7:00 a.m. Harris and Nolen further investigated the wreckage and crossed under the train on foot, heading east upwind, looking for a safe rescue approach. Chief Scraper instructed the rescuers to take their truck to initiate the rescue. Appellants allege that this attempt was thwarted by BCSO deputies who would not let SWFD move their vehicle closer to the wreckage. Appellants allege that in accordance with Bexar County's interpretation of the Bexar County Emergency Management Plan (Annexes F & Q), the mutual aid agreement among local governmental agencies, as well as National Incident Management System protocols and procedures, Bexar County determined that SAFD would be the exclusive agency to approach the accident scene and attempt a rescue,

concluding that no other rescuers would be allowed to attempt a rescue. Mary Hale was still in contact with the Bexar County dispatcher, and informed her that she and her husband were still in their vehicle trying to escape the chlorine cloud, but were unsuccessful because of the blocked road. The Hales were still having serious trouble breathing. The dispatcher maintained contact, indicated help was "on the way," and advised the Hales to return to the house and turn off the air conditioning. Returning to the house positioned the Hales closer to the chlorine spill and train derailment, and consequently, the Hales allege, exposed them to more concentrated chlorine contamination and poisoning.

Two hours after SWFD was allegedly prevented from initiating the Hales' rescue, the Hales were contacted by private rescuers by telephone. At 8:30 a.m., private rescuers informed the Hales that they were on their way to the Hales' residence from the southeast. Shortly thereafter, the private rescuers again contacted the Hales and informed them that BCSO sheriff's deputies blocked their rescue attempt. Additionally, the Hales' son Charles, who was familiar with the area and had experience as a volunteer firefighter, was also denied the opportunity to make a rescue attempt. Charles called 911 and informed the dispatcher that he could make the rescue; however, he was informed that he would be stopped if he attempted the rescue. After driving to the area, Charles could not get close enough to the house because sheriff's deputies blocked his access.

SAFD committed its HazMat teams to the incident, which began arriving at the command site at 8:30 a.m. and prepared for a tactical entry through the wreckage at approximately 9:45 a.m. to search for victims. At approximately 9:10 a.m., Bexar County 911 staff advised the Hales by telephone to get into the shower for decontamination in preparation for imminent evacuation. The Hales showered, ultimately creating a chemical reaction with the chlorine gas in the house, producing hydrochloric acid, which allegedly resulted in further harm and injury.

After SWFD's attempts to use its vehicle to make a rescue from the southeast were blocked, Chief Harris requested Lt. Harris and fireman Michael Yanelli find a way around the wreckage from the southeast to rescue the trapped residents. Lt. Harris and Yanelli drove their fire rescue truck along the county roads southwest of the wreck, searching for a way to approach the isolated segment of Nelson Road, upwind of the wreckage, and away from the chemical hot zone. The two rescuers were observed by the operator of BCSO Unit 2701, who contacted dispatch to see if BSCO had authorized any firemen to be on the back side of Nelson Road. BSCO Lt. Kyle Coleman and another deputy of the BSCO stopped Harris and Yanelli, and ordered them out of the area. Appellants allege that while in their clearly marked SWFD rescue vehicle, the two rescuers attempted to identify themselves and explain their actions, but the BSCO deputy ordered them to leave without an opportunity to show any credentials.

According to a partial transcript of BCSO radio communications prepared at the request of the National Transportation and Safety Board, at around 9:45 a.m., the operator of BSCO Unit 2701, Lt. Coleman, was advised about the SWFD presence and authority to check homes and proceed along Nelson Road. The BSCO operator of BSCO Unit 2004, Lt. Raul Fernandez, informed Lt. Coleman that the SWFD Assistant Chief had sent firemen into the back side of Nelson Road to check on some homes, and noted that "it's their call, it's the county side." Both Lt. Coleman and Lt. Fernandez were senior sheriff patrol supervisors in charge of operations at the accident. After being informed of SWFD's presence, Lt. Coleman responded "well, we just ordered them out of here, we've already took care of that, and we're not going to allow 'em back in here . . . until the fire command over there . . . tells us they can come back in." Appellants allege that the deputies were acting pursuant to an official decision to block anyone other than the SAFD HazMat team from approaching the accident scene. The Harrises and Scraper allege that Lt. Coleman, a BCSO sergeant, ordered them to stay out of the area. Similarly, the Hales allege that other private rescuers, such as their son, Charles, were prevented from attempting a rescue.

SAFD finally reached the Hales at 11:30 a.m. The Hales believe they could have been rescued as early as 7:30 a.m. if Lt. Coleman and other deputies had not interfered with SWFD. They allege that, as a result of the delay, they suffered prolonged exposure

to chlorine gas and hydrochloric acid. When SAFD arrived, Mary Hale was almost unconscious. Her brother-in-law, who was living with the Hales at the time, died a few months later. Wayne Hale's mother and step-sister, who lived next door, were dead when help arrived.

The Hales assert that their substantive due process rights under the Fourteenth Amendment were violated when Bexar County and its officials failed to allow the SWFD or other volunteer rescuers to attempt a rescue. The Harrises and Scraper contend that their constitutional rights were violated because they were wrongfully prevented from rescuing the Hales and others by Bexar County law enforcement personnel. Defendant Coleman filed a motion to dismiss on the basis that he was entitled to qualified immunity, which was granted by the district court. Bexar County subsequently moved for summary judgment on the claims asserted by Appellants in their third amended complaint. The district court granted Bexar County's motion for summary judgment, holding that Appellants had failed to allege a constitutional violation to support their claims under § 1983. The instant appeal followed.

II.

This court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court. *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 805 (5th Cir. 2007). Summary

judgment is proper if the record reflects "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding whether a genuine issue of material fact exists, this court must draw all reasonable inferences in favor of the responding party. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

In order to properly state a § 1983 claim against Bexar County, Appellants must identify (1) an official policy or custom (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Palmer v. City of San Antonio,* 810 F.2d 514, 516 (5th Cir. 1987) (quoting *Grandstaff v. City of Borger,* 767 F.2d 161, 169 (5th Cir. 1987)). A "'proper analysis requires us to separate two different issues when a section 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the [municipality] is responsible for that violation.'" *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 426 (5th Cir. 2006) (quoting *Collins v. City of Harker Heights,* 503 U.S. 115, 120 (1992)). A municipality cannot be held liable under § 1983 if there is no underlying constitutional violation. *Id.*

In order to establish the existence of a constitutional violation in this case, the Hales urge that we accept the state-created danger theory and hold Bexar County liable thereunder. This Circuit has never expressly accepted the state-created danger theory that a due process violation can be found if a

state created or increased the danger to the plaintiffs and acted with deliberate indifference. *Rios,* 444 F.3d at 422-23 ("[N]either the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder."); *see also Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability"); *Morin v. Moore,* 309 F.3d 316, 321-24 (5th Cir. 2002); *McKinney v. Irving Indep. Sch. Dist.,* 309 F.3d 308, 313-14 (5th Cir. 2002).

In *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), involving a § 1983 suit brought by the estate of a slain hostage against the county sheriff who commanded hostage rescue efforts, we refused to find a constitutional violation on the basis of the state-created danger theory, or otherwise, in the context of a failed rescue effort. In *Salas,* the plaintiff claimed that the county sheriff deprived the victim of her life by preventing city officials from coming to her aid, using incompetent hostage negotiators, and failing to provide adequate equipment to handle the hostage situation. *Salas,* 980 F.2d at 303. After determining that the plaintiff had not alleged a constitutional violation, this court found that the sheriff was entitled to qualified immunity from suit. *Id.*

In considering the claim in *Salas,* we recognized that some other Circuits had found "a denial of due process when the state creates the . . . dangers" faced

by an individual. *Id.* at 309. We also noted a Seventh Circuit case which held that a drowning victim had stated a claim under the due process clause when a deputy acting pursuant to county policy committed a constitutional tort by "cutting off private avenues of life saving rescue without providing an alternative." *Id.* at 308 (citing *Ross v. United States,* 910 F.2d 1422, 1433 (7th Cir. 1990)). After considering these potential theories, we held that the plaintiff had not alleged a constitutional violation, because despite the fact that the sheriff dismissed the city police officers who were attempting to aid the victim, the sheriff's deputies were at the same time securing the courthouse and commencing negotiations with the hostage-taker. *Salas,* 980 F.2d at 308. We held that the facts presented in *Salas* were unlike the situation in *Ross* because the sheriff had provided a "meaningful alternative" to the rescue efforts that were prevented. *Id.* ("[I]n *Ross,* no effort was made to rescue a drowning boy for thirty minutes. In contrast, at the time Carpenter dismissed the police his deputies were present and negotiating with Cabano. Carpenter did not use his authority as a state officer to prevent any rescue, rather he exercised his authority to replace one rescue effort with another.").

In addition, we noted that a state's failure to protect a person can amount to a constitutional violation only if the state had a duty to act. *Id.* at 308-09 (citing *DeShaney v. Winnebago Cty. Dep't of Social Servs.,* 489 U.S. 189 (1989)). After noting that some settings create a special relationship between the

state and a person – i.e., the person is held in state custody or otherwise prevented by the state from caring for herself – imposing a duty to protect the person, this court in *Salas* noted that a failed rescue effort did not present that type of circumstance. *Id.* The court further stated that even if this Circuit accepted the law of other Circuits which have found constitutional violations when the state created the danger, the sheriff had continued at all times to supervise a law enforcement effort to secure the victim's safe release, and thus the situation did not qualify as a state-created danger because the official did not "fail[ ] to take any action to alleviate the danger which they created or aggravated." *Id.* at 309.

Like those in *Salas,* the Hales' claims do not allege a constitutional violation for the purposes of § 1983. Even assuming that the prevention of all rescues without providing an alternative presents a valid due process claim in this Circuit, those are not the circumstances presented here. Although Appellants have presented evidence that Coleman prevented the SWFD volunteer firefighters from entering the area, he did provide for the eventual rescue of the Hales by the SAFD. Because Bexar County and Coleman provided a meaningful (though delayed) rescue alternative to the prevented private rescue effort, his actions did not violate the Hales' due process rights. Furthermore, Bexar County can only be held liable if the Hales have asserted that its officials had a duty to act. We have held that preventing a rescue effort does not, in and of itself, create a special

relationship between the state and a person imposing a duty to protect the person. *Salas,* 980 F.2d at 308.

Even if the state-created danger theory was explicitly recognized in this Circuit, it would not apply here for the same reasons expressed in *Salas.* In *Salas,* this court held that the defendant sheriff could not be held liable under the theory because he neither created the immediate risk of danger to the hostage nor did he abandon the victim in the face of the danger presented. 980 F.2d at 309. Certainly Lt. Coleman did not create the immediate danger of the chlorine gas coming from the derailed train. Even if the rule encompassed a claim based upon the increase of a "person's vulnerability to private violence by interfer[ence] with protective services which otherwise would be available," *Salas,* 980 F.2d at 308 (citing *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1990)), it would not apply here. Although Coleman excluded the volunteer firefighters, the SAFD – the firefighters Coleman thought were authorized to attempt the rescue – did eventually rescue the Hales and thus he cannot be characterized as "failing to take any action to alleviate the danger." *Id.* at. 309. Because there is no applicable precedent to support the existence of the violation of a constitutional right under these circumstances, the district court did not

err in granting summary judgment on the Hales' § 1983 claims.[1]

The Harrises and Scraper, members of the SWFD who attempted to rescue the Hales, also assert that the district court erred in granting summary judgment in favor of Bexar County on the grounds that they failed to assert a constitutional violation or deprivation to sustain their claims under § 1983. The Harrises and Scraper assert that their rights under both the Fourteenth and First amendments were violated when they were prevented by Bexar County officials from rescuing the Hales.[2]

As our sister Circuits have observed, there is no constitutionally cognizable interest in a volunteer position. *See Versarge v. Township of Clinton N.J.*, 984 F.2d 1359, 1370 (3d. Cir. 1993) (holding that volunteer firefighter had no due process interest in his position despite the fact that he received benefits); *Hyland v. Wonder,* 972 F.2d 1129, 1140-42 (9th Cir. 1992) (holding that the litigant had no protected

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[1] Because the Hales have failed to allege a constitutional violation, we need not address the issue of whether they properly alleged that Bexar County had an official policy which was the moving force behind any such violation. *See Rios,* 444 F.3d at 426.

[2] Although Appellants mention the First Amendment in their brief, they do not provide any arguments concerning a First Amendment violation or cite any authorities to support such an argument. Accordingly, this argument has been waived. *See United States v. Edwards,* 303 F.3d 606, 647 (5th Cir. 2002) (inadequately briefed arguments are waived).

property interest in or legal entitlement to his volunteer position). Although those cases involved litigants who were terminated from their positions, and not those who were prevented from performing in their volunteer capacity, they support the conclusion that the Harrises and Scraper do not have a due process right to serve as volunteer firefighters.

The Harrises and Scraper also allege that they suffered an equal protection violation when they were denied access to the Hales. Because the SWFD are not members of a protected class, any equal protection violation is evaluated under the rational basis standard.[3] *Reid v. Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 753 (5th Cir. 1988) ("Since this case does not concern a suspect or quasi-suspect classification such as race or sex to which heightened scrutiny is given, the equal protection clause requires only a minimum degree of rationality."). An equal protection violation does not arise if there is any basis for a classification or official action that bears a debatably rational relationship to a conceivably legitimate governmental end. *Id.*; *see also Stefanoff v. Hays County, Tex.*, 54 F.3d 523, 526 (5th Cir. 1998) ("[E]qual protection rights are not violated as long as the policy is rationally related to some legitimate governmental goal."). Although neither party addressed the issue of whether Coleman or Bexar County had a rational basis for

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[3] Appellants do not assert in their brief, nor did they assert at trial, that they are part of a suspect class.

excluding the volunteer SWFD firefighters while allowing the professional SAFD firefighters to enter, it is evident that under the circumstances presented here, excluding volunteers, however highly trained, in a dangerous emergency situation is a conceivably legitimate government goal.

III.

Because Appellants failed to allege a violation or deprivation of their constitutional rights, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARY HALE, WAYNE HALE, JENNIFER HARRIS, HAROLD HARRIS, and DARRELL SCRAPER, Plaintiffs,	§	**No. SA-06-CA-0562-RF**
v.	§	
BEXAR COUNTY, TEXAS, Defendant.	§	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Jul. 30, 2008)

BEFORE THE COURT are Defendant Bexar County's ("Bexar County") Motion for Summary Judgment (Docket No. 66), filed May 8, 2008; Plaintiffs' Response (Docket No. 67), filed May 16, 2008; and Bexar County's Reply (Docket No. 68), filed May 27, 2008. The Court held a hearing on this matter on July 15, 2008. After careful consideration, of the briefs, the arguments made in open court, and the applicable law, the Court is of the opinion that the Motion for Summary Judgment (Docket No. 66) should be GRANTED.

Introduction

This case involves a tragic train derailment that resulted in the death and injury of residents in the nearby area. Both Bexar County and volunteer officials arrived on scene to assist during the emergency. Plaintiffs allege Bexar County prevented attempted rescue efforts, which could have limited their injury and prevented death. Previously this Court dismissed claims against Defendant Coleman based on qualified immunity. The Court found that Plaintiffs failed to state a claim for a violation of a clearly established constitutional right. Bexar County now moves for summary judgment arguing that there can be no award of damages against a municipality when the actions of its officer did not inflict constitutional harm. After reviewing the previous ruling on this matter, the Court finds that because no underlying constitutional violation was committed, there can be no municipal liability. Accordingly, the Motion for Summary Judgment is granted.

Factual and Procedural Background

At 5:00 a.m. on June 28, 2004, a train carrying chlorine gas derailed near the home of Plaintiffs Wayne and Mary Hale (collectively the "Hales"). *Third Am. Compl.,* at 3. A Union Pacific train collided with a Burlington Northern train where Nelson road crosses the train tracks in southwest Bexar County. *Id.* at 5. The train derailment was within a couple hundred yards of the Hale's house. *Id.* The Hales

were awakened by the sound of the derailment and the overwhelming smell of the concentrated chlorine gas. *Id.* Alarmed by the noise, Mary Hale reported the crash to a Bexar County 911 operator, who notified the Southwest Volunteer Fire Department ("SWFD"). *Id.* at 4. The dispatcher contacted the appropriate authorities about the Hales' claim that there was smoke and that they were having trouble breathing, but failed to mention anything about a train derailment. *Id.* The incident was within the jurisdiction of SWFD, and outside the city limits of the City of San Antonio. *Id.* at 3. Accordingly, the Bexar County dispatcher called the SWFD and Plaintiffs Harold and Jenniefer Harris in their capacities as assistant chief and lieutenant, respectively, were dispatched to the scene. *Id.* at 4. The Harrises reached the scene at 5:15 a.m, followed by deputies from the Bexar County Sheriff's Office ("BCSO") (dispatched to assist SWFD), and SWFD Chief Darrell Scraper. *Id.* at 4-7.

As they approached in early morning darkness, not yet aware that they were responding to a train derailment, a BCSO patrol unit and a SWFD motor unit drove into a cloud of chlorine gas. *Id.* at 5. The gas was leaking from a ruptured tank car on the Union Pacific train. *Id.* The two lead vehicles were overcome by gas, and the sheriff's deputy was able to back his vehicle out and escape. *Id.* at 5. However, an injured firefighter became incapacitated and was rescued by SWFD Chief Harris. *Id.* Harris requested aid from Jarrett Fire Department ("JFD") and

Geronimo Village Fire Department ("GVFD"), and requested an ambulance. *Id.*

After the injured firefighter was transported for further medical treatment, the SWFD rescuers put on their bunker gear and self-contained breathing apparatus, which provided limited protection from the leaking chlorine gas, and returned to the scene pursuant to national, state, and local protocols for hazardous locations. *Id.* at 5-6. Within an hour of the collision and derailment, the Bexar County dispatcher advised SWFD and BCSO of the chlorine cargo on the Union Pacific train and the wind direction. *Id.* at 6. A BSCO sergeant instructed all BCSO units to stay clear of the scene. *Id.*

Meanwhile, around 6:00 a.m., Mary Hale made another call to 911, reporting that she, her husband, and her brother-in-law were having serious trouble breathing and were attempting to evacuate in their vehicle. *Id.* at 6. Mary Hale informed dispatch that their access to Nelson Road was blocked by a neighbor's locked gate, which prevented them from driving their vehicle or even walking to the vicinity of the Nelson Road bridge. *Id.* They returned home. *Id.* Plaintiffs allege that Bexar County officials knew of the private gate that obstructed their exit because it had been the subject of a newspaper article and County officials regarded it as a public nuisance and were considering legal action. *Id.* However, the gate remained intact at the time of the train wreck. *Id.*

Chief Scraper arrived at the scene around 6:00 a.m. and established a forward command position, while Harris retained his authority as incident commander. San Antonio Fire Department ("SAFD") personnel began arriving on the scene and were briefed by SWFD. *Id.* at 7. Around 6:15 a.m. Harris and SWFD Capt. Nolen found and rescued the Union Pacific train engineer, carried him east on Nelson Road away from the wreckage for about ten minutes, and waited for a SWFD rescue vehicle. *Id.* The two rescuers, still in their bunker gear, returned to the wreckage to search for the missing train conductor. *Id.*

Around 6:30 a.m. BCFA notified SWFD that nearby residents, including the Hales, were trapped at 9281 Nelson Road. *Id.* at 7. (This was an isolated segment of Nelson Road across from the wreckage. *Id.*) Both groups discussed options for rescuing the Hales and SWFD, equipped with bunker gear and self-contained breathing apparatuses, prepared to approach the Hales' residence through a cornfield, upwind from the spill. *Id.* At 7:00 a.m. Harris and Nolen further investigated the wreckage and crossed under the train on foot, heading east upwind, looking for a safe rescue approach. *Id.* at 7-8. Chief Scraper instructed the rescuers to take their Motor 3 truck to initiate the rescue, possibly by driving a short distance south down Pearsall Road and across a corn field, to approach the residences from the south side of the tracks – upwind from the chlorine contamination. *Id.* at 8. This attempt was thwarted by sheriff

deputies who would not let SWFD move their vehicle closer to the wreckage. *Id.*

By as late as 8:00 a.m., SAFD had not yet committed the city's HazMat team to the incident. *Id.* at 9. SWFD Chief Scraper and Harris had asserted their authority as incident commanders pursuant to the Local Emergency Planning Committee (LEPC), HAZMAT/WMD Contingency Plan, the Bexar County Emergency Management Plan (Annexes F & Q), and the mutual aid agreement among local governmental agencies, as well as National Incident Management System protocols and procedures. According to Plaintiffs, Bexar County disregarded SWFD's authority.

In accordance with Bexar County's interpretation of the Bexar County Emergency Management Plan (Annexes F & Q), the mutual aid agreement among local governmental agencies, as well as National Incident Management System protocols and procedures, Bexar County determined that SAFD would be the exclusive agency to approach the accident scene and attempt a rescue, concluding that no other rescuers, including county fire, would be allowed to attempt a rescue.

Meanwhile, Mary Hale was still in contact with the Bexar County dispatcher, and informed her that she and her husband were still in their vehicle trying to escape the chlorine cloud, but were unsuccessful because of the blocked road. *Id.* at 10. The Hales were still having serious trouble breathing. *Id.* The dispatcher maintained contact, indicated help was "on

the way," and advised the Hales to return to the house, "shelter in place," and turn off the air conditioning. *Id.* Ultimately, turning off the air conditioning worsened the situation. *Id.* Furthermore, returning to the house positioned the Hales closer to the chlorine spill and train derailment compared to the destination the Hales had reached while attempting to escape, which was closer to the safe zone. *Id.* Consequently, this subjected the Hales to more concentrated chlorine contamination and poisoning. *Id.* at 11.

Two hours after SWFD was prevented from initiating the Hales' rescue, the Hales were contacted by private rescuers by telephone. *Id.* At 8:30 a.m., private rescuers informed the Hales that they were on their way to the Hales's residence from the southeast. *Id.* Shortly thereafter, the private rescuers again contacted the Hales and informed them that sheriff's deputies blocked their rescue attempt under threat of arrest. *Id.*

Additionally, the Hales's son Charles, who was familiar with the area and had experience as a volunteer firefighter with Primrose Fire Department, was also denied the opportunity to make a rescue attempt. *Id.* Charles called 911 and informed the dispatcher that he could make the rescue; however, he was informed that he may get shot if he attempted the rescue. *Id.* at 12. After driving to the area, Charles could not get close enough to the house because sheriff's deputies blocked his access. *Id.*

After SWFD's attempts to use its Motor 3 vehicle to make a rescue from the southeast were blocked, Chief Harris requested Lt. Harris and GVFD fireman Yanelli find a way around the wreckage from the southeast to rescue the trapped residents. *Id.* at 13. Both Lt. Harris and Yanelli had basic HazMat training, and Harris had successfully rescued two victims from the wreckage. *Id.* Furthermore, Harris was familiar with the scene due to a recent rescue she had been involved with around the same area. *Id.*

SAFD committed its HazMat teams, which began arriving at the command site at 8:30 a.m., and prepared for a tactical entry through the wreckage at approximately 9:45 a.m. to search for the missing conductor – not the Hales. *Id.* at 14. Plaintiffs contend that this rescue attempt, through the wreckage, was unnecessarily dangerous, slow, and inefficient. *Id.*

Despite the fact that the only coordinated rescue attempt was aimed at the missing conductor, at approximately 9:10 a.m., Bexar County 911 staff advised the Hales by telephone to get into the shower for decontamination in preparation for *imminent evacuation.* Reluctantly, the Hales showered off, ultimately creating a chemical reaction with the chlorine gas in the house, producing hydrochloric acid, which allegedly resulted in further harm and injury. *Id.* at 14-15.

At this time, Lt. Harris and Yanelli drove their fire rescue truck along the county roads southwest of

the wreck, searching for a way to approach the isolated segment of Nelson Road, upwind of the wreckage, and away from the chemical hot zone. *Id.* at 15. The two rescuers were observed by the operator of BCSO Unit 2701, who contacted dispatch to see if BSCO had authorized any firemen to be on the back side of Nelson Road. *Id.* Lt. Kyle Coleman and another deputy (of the BSCO) stopped Harris and Yanelli, and ordered them out of the area. *Id.* While in their clearly marked SWFD rescue vehicle, the two rescuers attempted to identify themselves and explain their actions; however, the BSCO deputy continued to yell at them and ordered them to leave without an opportunity to show any credentials. *Id.* Although the rescuers objected to the interference, they complied due to fear of arrest. *Id.*

According to a partial transcript of BCSO radio communications prepared at the request of the National Transportation and Safety Board, at around 9:45 a.m., the operator of BSCO Unit 2701, Lt. Coleman was advised about the SWFD presence and authority to check homes and proceed along Nelson Road. *Id.* at 17. The BSCO operator of BSCO Unit 2004, Lt. Raul Fernandez informed Lt. Coleman that the SWFD Asst. Chief had sent firemen into the back side of Nelson Road to check on some homes, and noted that "it's their call, it's the county side." *Id.* at 17. Both Lt. Coleman and Lt. Fernandex were senior sheriff patrol supervisors in charge of operations at the accident. *Id.* Nevertheless, after being informed of SWFD's presence and apparent jurisdiction, or at

least authority to conduct their rescue efforts, Lt. Coleman responded "well, we just orderd them out of here, we've already took care of that, and we're not going to allow 'em back in here . . . until the fire command over there . . . tells us they can come back in." *Id.* Plaintiffs allege that the deputies were acting pursuant to an official decision to block anyone other than SAFD HazMat team from approaching the accident scene. *Id.* at 17.

The Harrises and Darrell Scraper allege that Lt. Coleman, a BCSO sergeant, ordered them to stay out of the area. *Id.* at 9. Similarly, the Hales allege that other private rescuers, such as their son, Charles, were prevented from attempting a rescue *Id.* at 11-12. Lt. Coleman denies these allegations. *Answer,* at 3-5.

When the Hales returned home, they again called 911 and followed instructions to turn off their air-conditioning and rinse in the shower (for decontamination) in preparation for rescue. *Third Am. Compl.,* at 33. Both actions increased the humidity inside their home, causing a chemical reaction which produced hydrochloric acid. *Id.* The 911 operator assured them that help was on the way, and advised them to stay put. *Id.* The Hales allege that they detrimentally relied on the operator, instead of continuing self-evacuation efforts or contacting private rescuers. *Id.* at 34.

SAFD finally reached the Hales at 11:30 a.m. *Id.* at 32-33. The Hales believe they could have been saved as early as 7:30 a.m. if Lt. Coleman and other

deputies had not interfered with SWFD. *Id.* They allege that, as a result of the delay, they suffered prolonged exposure to chlorine gas and hydrochloric acid. *Id.* at 33. When SAFD arrived, Mary Hale was almost unconscious and near death. *Id.* Her brother-in-law, who was living with the Hales at the time, died a few months later. Finally, Wayne Hale's mother and step-sister, who lived next door, were dead when help arrived. *Id.*

Plaintiffs contend this was an official county decision pursuant to an interpretation of LEPC, HazMat/WMD Contingency Plan, the Bexar County Emergency Management Plan (Annexes F & Q), and the mutual aid agreement among local governmental agencies as well as National Incident Management System protocols and procedures.

Claims

Plaintiffs Mary Hale and Wayne Hale (collectively "Plaintiffs") assert that Lt. Coleman acted pursuant to a policy, practice, or custom adopted by Bexar County that resulted in their constitutional rights being violated. Alternatively, Plaintiffs argue it was Bexar County's failure to adequately train and supervise law enforcement officers not to exceed their authority under the LEPC HAZMAT/WMD Contingency Plan, the Bexar County Emergency Management Plan, and the mutual aid agreement among local government agencies, that resulted in their constitutional rights being violated. *Id.* at 17, 39.

Bexar County asserts that it is entitled to Summary Judgment as a matter of law according to *City of Los Angeles v. Heller* because a municipality cannot not be held liable under Section 1983 where no constitutional deprivation occurred. 475 U.S. 796 (1986). Bexar County further contends that according to *Monell v. New York City Dept. of Social Science,* Plaintiffs have failed to demonstrate a custom or policy of Bexar County that was the moving force behind the alleged injuries. 436 U.S. 658 (1978).

Standard of Review

Summary judgment is appropriate if the evidence shows there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Eason v. Thaler,* 73 F.3d 1322, 1325 (5th Cir. 1996); *Int'l Shortstop Inc. v. Rally Inc.,* 939 F.2d 1257, 1263 (5th Cir. 1991). In the summary judgment process, both movants and non-movants bear burdens of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). The movant with the burden of proof at trial must establish every essential element of its claim or affirmative defense. *Id.* at 322. In so doing, the moving party without the burden of proof need only point to the absence of evidence on an essential element of the non-movant's claims or affirmative defenses. *Id.*

At that point, the burden shifts to the non-moving party to "produce evidence in support of its

claims or affirmative defenses." *Id.* at 324. The non-moving party must produce "specific facts" showing a genuine issue for trial and not mere general allegations. Fed. R. Civ. P. 56(e); *Tubacex v. M/V Risan,* 45 F.3d 951, 954 (5th Cir. 1995); *Ray v. Tandem Computers, Inc.,* 63 F.3d 429, 433 (5th Cir. 1995). It is important to note that "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Tex. Tech. Univ.,* 80 F.3d 1042, 1047 (5th Cir. 1996).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. Thus, the Court construes all facts and inferences in the light most favorable to the non-moving party. *Richter v. Merchs. Fast Motor Lines, Inc.,* 83 F.3d 96, 98 (5th Cir. 1996).

The Fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence before the court." *James v. Saudler,* 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Electrical Indus. Co., v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)). To the extent facts are undisputed, a Court may resolve the case as a matter of law. *Blackwell v. Barton,* 34 F.3d 298, 301 (5th Cir. 1994).

Analysis

Bexar County cannot be held liable under Section 1983 where no constitutional depravation has occurred. *Heller,* 475 U.S. at 799 (holding that "[i]f a person has suffered non constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point") (emphasis in original). Furthermore, because there was no underlying constitutional violation, the issue regarding whether Bexar Conty was the moving force behind the violation becomes moot. *Flores v. Sanchez,* 2005 U.S. Dist. LEXIS 15417, at *30 (W.D. Tex. July 29, 2005); *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978).

Bexar County asserts that because its employee deputy did not violate a clearly established constitutional or federal right it cannot be held liable under Section 1983. Bexar County also argues that although municipalities can be held liable under section 1983, it is not subject to vicarious or *respondeat superior* liability for the actions of its law enforcement or emergency responders. Instead, municipal liability under Section 1983 can only arise when the harm occurred as a result of an official policy or custom, which was the moving force behind the constitutional violation.

In order to properly state a Section 1983 claim against Bexar County, Plaintiffs must identify (1) an official policy or custom (2) of the city's policymaker

(3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Palmer v. City of San Antonio,* 810 F.2d 514, 516 (5th Cir. 1987) (quoting *Grandstaff v. City of Borger,* 767 F.2d 161, 169 (5th Cir. 1987)). Unless an employee acts pursuant to an official policy or custom, municipalities are not liable for the constitutional torts of their employees. *Monell,* 436 U.S. at 663 n.7 (1978) (stating the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under Section 1983 for the constitutional torts of their employees).

"To support a claim based upon the existence of an official custom or policy, the Plaintiff must plead facts which show that: 1) a policy or custom existed; 2) the governmental policy makers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation." *Meadowbriar Home for Children, Inc. v. G.B. Gunn,* 81 F.3d 521, 532-33 (5th Cir. 1996) (citing *Palmer,* 810 F.2d at 516).

Plaintiffs must allege sufficient facts to show that Bexar County, through its policy makers, created or had constructive knowledge of an official policy that sanctioned or encouraged a deprivation of rights protected by the Constitution. *See Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir. 1984). Official policy is:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and

> promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Id.

Fifth Circuit precedent has consistently held that there can be no award of damages against a municipal corporation based on the actions of one of its officers when the officer inflicted no constitutional harm. *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 426 (5th Cir. 2006); *Alpha v. Hooper*, 440 F.3d 670, 672 (5th Cir. 2006); *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003); *Saenz v. Heldenfels Bros., Inc.* 183 F.3d 389, 392 (5th Cir. 1999). In a previous Order, this Court examined whether Deputy Coleman's actions amounted to a violation of a clearly established constitutional right, the first prong under qualified immunity. *See* Docket No. 46. After an

extensive analysis the Court found guidance in *Salas v. Carpenter,* 980 F.2d 299, 306 (5th Cir. 1992), and ruled that the a constitutional depravation or denial of a federal right had not occurred. The Court stated:

> Applying these principles, the Hales have failed to state a due process claim. Coleman neither caused the derailment, nor did anything to affirmatively exacerbated the danger. Further, he provided for the Hales to be rescued by SAFD. Thus, this case is similar to *Salas,* where the sheriff exercised his authority to replace one rescue effort with another. Despite their horrifying experience, the Hales simply have not alleged any facts indicating egregious official conduct or an abuse of authority with the intent to injure. The Fourteenth Amendment does not punish negligence committed by law enforcement officers responding to an emergency in a dangerous environment and on the basis of uncertain information.
>
> The Hales purport to bring an equal protection claim, but their Complaint is devoid of any supporting factual allegations or legal authority. The equal protection clause generally requires the government to treat similarly situated people alike.[1] This Court may conduct an equal protection analysis "only if the challenged government action

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[1] *Rolf v. City of San Antonio,* 77 F.3d 823, 828 (5th Cir. 1996).

> classifies or distinguishes between two or more relevant groups."[2] The Hales, however, do not allege that Coleman treated them differently from other individuals, nor that they are members of a suspect class, nor that Coleman purposefully discriminated against them or sought to prevent them from exercising a fundamental right.[3] Accordingly, the Hales have not stated a clearly established violation of their equal protection rights.
>
> This Court does not doubt that the Hales suffered physical injury and agony from the unfortunate events of June 28, 2004. Further, the Court expresses no opinion concerning whether Coleman properly handled the situation. Nonetheless, the Hales have not carried their burden to state a claim against Coleman for the violation of a clearly established constitutional or federal statutory right. Because Coleman is entitled to qualified immunity, his Motion to Dismiss must be GRANTED. . . .

Docket No. 46 at 11-12. Regarding the firefighters claims, the Court stated:

> [T]he Court is of the opinion that the firefighters have failed to state a due process claim. . . .

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[2] *Id.*

[3] *See DeShaney*, 489 U.S. at 197 n.3.

> In sum, the firefighters have not carried their burden to state a claim against Coleman for the violation of a clearly established constitutional or federal statutory right. Coleman is entitled to qualified immunity, and his motion to dismiss must be GRANTED,

Id. at 12-13. Based on this Court's previous findings, and Fifth Circuit precedent that requires the existence of a constitutional depravation before municipal liability can apply under Section 1983, Bexar County is not liable under Section 1983 as a matter of law. *Heller,* 475 U.S. at 799. Accordingly, Plaintiffs cannot show that Bexar County was the moving force behind Plaintiffs' constitutional rights violation because there was no underlying violation. *Monell,* 436 U.S. at 694. Therefore, Bexar County's Motion for Summary Judgment should be granted.

As an aside, the Court acknowledges that our civil servants provide an invaluable service to our communities on a daily basis. One can only imagine the difficult circumstances they encounter in the line of duty. However, it is apparent that regardless of good intentions mistakes are made from time to time.

Without expressing an opinion on whether Lt. Coleman properly handled the situation, this Court is sympathetic to Plaintiffs in this case and the experience they have endured. Clearly, there is room for improvement in the coordination and organization of rescue efforts, which fell short of the level of services and coordination county residents would

expect when faced with such a tragic scenario. Although the Court is bound by the current state of the law, and as a result Bexar County is relieved of civil liability, the Court is of the opinion that Bexar County should immediately and unerringly redevelop and reevaluate the emergency rescue efforts so a similar situation can never present itself.

Additionally, the Court commends the attorneys on both sides of this case for their thoughtful, well-reasoned briefing and first-rate oral presentations. These types of cases are difficult for all parties involved, including the lawyers on both sides and the Court. The fact remains, however, that Plaintiffs' evidence does not carry the burden in establishing municipal liability.

Conclusion

For the foregoing reasons, the Court finds that because there was no underlying constitutional violation or depravation of a federal right, Bexar County cannot be held liable under Section 1983. Furthermore, Plaintiffs have failed to establish a policy or custom that was the moving force behind a constitutional violation. Accordingly, Bexar County's Motion for Summary Judgment (Docket No. 66) is GRANTED.

It is so ORDERED.

Signed this 30th day of July, 2008.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARY HALE, WAYNE HALE, JENNIFER HARRIS, HAROLD HARRIS, and DARRELL SCRAPER, Plaintiffs,	§	**No. SA-06-CA-0562-RF**
v.	§	
BEXAR COUNTY, TEXAS, Defendant.	§	

FINAL JUDGMENT

(Filed Jul. 30, 2008)

On this day, the Court entered an Order Granting Defendant's Motion for Summary Judgment. Consistent with the Order the Court now enters its Final Judgment pursuant to Fed. R. Civ. P. 58.

It is therefore ORDERED that Defendant's Motion for Summary Judgment (Docket No. 66) is GRANTED and the above-styled and numbered cause is DISMISSED WITH PREJUDICE.

It is further ORDERED that each party BEAR its own costs.

Signed this 30th day of July, 2008.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARY HALE,	§	
WAYNE HALE,	§	
JENNIFER HARRIS,	§	
HAROLD HARRIS, and	§	**No.**
DARRELL SCRAPER,	§	**SA-06-CA-0562-RF**
Plaintiffs,	§	
	§	
v.	§	
BEXAR COUNTY, TEXAS,	§	
	§	
Defendant.	§	

ORDER DENYING BEXAR COUNTY'S MOTION TO DISMISS

(Filed Oct. 11, 2007)

BEFORE THE COURT is Defendant Bexar County's ("Bexar County") Motion to Dismiss (Docket No. 47), filed April 3, 2007; and Plaintiffs' Response (Docket No. 48), filed April 12, 2007. After careful consideration, the Court is of the opinion that the Motion to Dismiss should be DENIED.

Summary

This case involves a tragic train derailment that resulted in the death and injury of residents in the nearby area. Both Bexar County and volunteer officials arrived on scene to assist during the

emergency. Plaintiffs allege Bexar County prevented purported rescue efforts, which could have limited their injury and prevented death. Bexar County moves to dismiss asserting governmental immunity and specifically, Plaintiffs' failure to sufficiently allege a policy or custom of the County. The Court finds that because Plaintiffs have satisfied the generic notice pleading requirements of Rule 8, which is applicable in suits against municipalities, Plaintiffs' claims survive Bexar County's Motion to Dismiss. Accordingly, Bexar County's Motion to Dismiss should be denied.

Background

At 5:00 a.m. on June 28, 2004, a train carrying chlorine gas derailed near the home of Plaintiffs Wayne and Mary Hale. *Second Am. Compl.,* at 3. Alarmed by the noise, Mary Hale reported the crash to a Bexar County 911 operator, who notified the Southwest Volunteer Fire Department (SWFD) *Id.* at 4. Plaintiffs Harold and Jennifer Harris and Darrell Scraper are the SWFD assistant chief, lieutenant, and chief, respectively. The Harrises reached the scene at 5:15 a.m, followed by deputies from the Bexar County Sheriff's Office (BCSO), and then Darrell Scraper. *Id.* at 4-7. As all approached in darkness, a BCSO patrol unit and a SWFD motor unit drove into a cloud of chlorine gas. *Id.* at 5. The deputy managed to escape, but the firefighter had to be rescued by Harold Harris. *Id.* In response, BCSO ordered all units to stay clear of the wreckage. *Id.*

Meanwhile, around 6:00 a.m., Mary Hale made another call to 911, reporting that she and her husband were having trouble breathing and would try to evacuate in their vehicle. *Id.* at 6. Their access to Nelson Road was blocked, however, by a neighbor's locked gate, and they returned home. *Id.* Around that time, SWFD learned that nearby residents, including the Hales, were trapped. *Id.* at 7-8. San Antonio Fire Department (SAFD) personnel arrived at the scene and were briefed by SWFD. Both groups discussed options for rescuing the Hales. *Id.* at 8. Equipped with bunker gear and self-contained breathing apparatuses, SWFD decided to approach the Hales' residence through a cornfield, upwind from the spill. *Id.*

The Harrises and Darrell Scraper allege that Defendant Kyle Coleman, a BCSO sergeant, ordered them to stay out of the area. *Id.* at 9. Similarly, the Hales allege that other private rescuers, such as their son, Charles, were prevented from attempting a rescue *Id.* at 11-12. Coleman denies these allegations. *Answer,* at 3-5.

When the Hales returned home, they again called 911 and followed instructions to turn off their air-conditioning and rinse in the shower (for decontamination) in preparation for rescue. *Second Am. Compl.,* at 33. Both actions increased the humidity inside their home, causing a chemical reaction which produced hydrochloric acid. *Id.* The 911 operator assured them that help was on the way, and advised them to stay put. *Id.* The Hales allege that they

detrimentally relied on the operator, and could have either continued self-evacuation efforts or contacted private rescuers. *Id.* at 34.

SAFD finally reached the Hales at 11:30 a.m. *Id.* at 32-33. The Hales believe they could have been saved as early as 7:30 a.m. if Coleman and other deputies had not interfered with SWFD. *Id.* They allege that, as a result of the delay, they suffered prolonged exposure to chlorine gas and hydrochloric acid. *Id.* at 33. When SAFD arrived, Mary Hale was almost unconscious and near death. *Id.* Her brother-in-law, who was living with the Hales at the time, died a few months later. Finally, Wayne Hale's mother and step-sister, who lived next door, were dead when help arrived. *Id.*

Claims

Plaintiffs[1] Mary Hale and Wayne Hale (collectively "Plaintiffs") assert Bexar County violated their procedural and substantive due process rights, as well their right to equal protection of the laws, by

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[1] In a previous Order Granting Defendant Coleman's Motion to Dismiss (Docket No. 46) this Court found Jennifer Harris, Harold Harris, and Darrell Scraper – as volunteer firefighters – lacked a clearly established constitutional or federal statutory right to provide emergency rescue services without interference from law enforcement. *See Order Granting Mot. to Dismiss*, at 12-16. Consequently, the Motion to Dismiss currently before the Court against Bexar County involves only Mary Hale and Wayne Hale.

failing to adequately train and supervise law enforcement officers not to exceed their authority under the LEPC HAZMAT/WMD Contingency Plan, the Bexar County Emergency Management Plan, and the mutual aid agreement among local government agencies. *Id.* at 17, 39.

Standard of Review

Asserting governmental immunity, Defendant Bexar County moves to dismiss under Rule 12(b)(6). The Court must accept all well-pleaded facts as true and view them in the light most favorable to Plaintiffs. *Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir. 1996). However, the Court does not credit conclusory allegations or unwarranted deductions from the facts. *Tuchman v. DSC Commc'ns Corp.,* 14 F.3d 1061, 1067 (5th Cir. 1994). The issue at this stage is not whether Plaintiffs will prevail, but whether they are entitled to pursue their complaint and offer evidence in support thereof. *Doe v. Hillsboro Indep. Sch. Dist.,* 81 F.3d 1395, 1401 (5th Cir. 1996). Motions to dismiss are disfavored and should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Beanal v. Freeport-McMoran, Inc.,* 197 F.3d 161, 164 (5th Cir. 1999); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Analysis

Bexar County argues Plaintiffs have failed to allege the existence of a policy or custom subjecting Bexar County to liability under section 1983. *Def.'s Mot. to Dismiss* at 3-4. Bexar County argues that although municipalities can be held liable under section 1983, Bexar County is not subject to vicarious or *respondeat superior* liability for the actions of its law enforcement or emergency responders. *Id.* at 9. Instead, municipal liability under section 1983 can only arise when the harm occurred as a result of an official policy or custom, which then subjects Bexar County to liability under section 1983. *Id.* at 7.

In order to properly state a § 1983 claim against Bexar County, Plaintiffs must identify (1) an official policy or custom (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Palmer v. City of San Antonio,* 810 F.2d 514, 516 (5th Cir. 1987) (quoting *Grandstaff v. City of Borger,* 767 F.2d 161, 169 (5th Cir. 1987)). Unless an employee acts pursuant to an official policy or custom, municipalities are not liable for the constitutional torts of their employees. *Monell,* 436 U.S. at 663 n.7 (1978) (stating the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under section 1983 for the constitutional torts of their employees).

"To support a claim based upon the existence of an official custom or policy, the Plaintiff must plead facts which show that: 1) a policy or custom existed;

2) the governmental policy makers actually or constructively knew of its existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation." *Meadowbriar Home for Children, Inc. v. G.B. Gunn*, 81 F.3d 521, 532-33 (5th Cir. 1996) (citing *Palmer*, 810 F.2d at 516). Bexar County moves to dismiss Plaintiffs' section 1983 claim because Plaintiffs have failed to allege any specific policy or custom that was maintained by the county that caused Plaintiffs' alleged constitutional deprivations.

In order to succeed, Plaintiffs must allege sufficient facts to show that Bexar County, through its policy makers, created or had constructive knowledge of an official policy that sanctioned or encouraged a deprivation of rights protected by the Constitution. *See Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). Official policy is:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be

> attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Id.

This Court has held that generic "boilerplate" language regarding a "custom or practice" in a section 1983 suit against a municipality is sufficient to survive a motion to dismiss. *Wayne v. City of San Antonio,* No. 06-551, 2006 WL 3487022, at *4 (W.D. Tex. November 30, 2006). Section 1983 claims against municipalities are treated differently than section 1983 claims against public officials in their individual capacity claims. *See Mack v. City of Abilene,* 461 F.3d 547, 556 (5th Cir. 2006). Accordingly, Plaintiffs' section 1983 claim against Bexar County must meet only the generic pleading standard of Rule 8(a) and not the heightened pleading standard applicable to section 1983 claims against public officials in their individual capacity. *Wayne,* 2006 WL 3487022, at *4.

In section 1983 suits against municipalities and individual defendants in their official capacities, the generic pleading requirements of Rule 8(a) govern. *Anderson v. Pasadena Indep. Sch. Dist,* 184 F.3d 439, 443 (5th Cir. 1999) (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 166-67 (1993); *Baker v. Ritnal,* 75 F.3d 190, 195 (5th Cir. 1996). In *Leatherman v. Tarrant*

County Narcotics Intelligence & Coordination Unit, the Supreme Court held that federal courts could not apply a "heightened pleading standard" to municipalities and public officials sued in their official capacities. 507 U.S. at 166-67. Instead, plaintiffs only need to provide "a short and plain statement of the claim that will give Defendants fair notice of what Plaintiff's claim is and the ground which it rests." *Id.* at 168. Specifically, the Court in *Leatherman* held the heightened pleading standards for civil rights claims against municipalities cannot be squared with the "liberal system of 'notice pleading' set up by the Federal Rules." *Id.* Additionally, the Court disapproved of the need for a plaintiff to plead more than one instance of misconduct to establish section 1983 liability. *Id.* at 167.

Bexar County's Motion to Dismiss is filed pursuant to Rule 12(b)(6) and Rule 7. Bexar County argues Plaintiffs fail to provide examples or allegations of an illegal policy or custom. *Def.'s Mot. to Dismiss* at 8. And, although Plaintiffs use the "magical words of custom or policy" they never identify it. *Id.* at 3-4. Plaintiffs' lack of particularity and specificity in its pleadings is at the heart of Bexar County's Motion. The core legal issue in front of the Court in this Motion boils down to whether "boilerplate" language in the complaint about a "custom or practice" is sufficient to survive Bexar County's Motion to Dismiss based on governmental immunity.

While individual capacity suits require a heightened pleading standard, section 1983 suits against a municipality need only provide sufficient notice to the defendant of the claim and the "grounds upon which it rests."[2] *Mack*, 461 F.3d at 556. In the present case, Plaintiffs' Amended Complaint alleges Bexar County has a policy or custom of not adequately training or supervising that resulted in a deprivation of constitutional rights. Specifically, Plaintiffs allege Bexar County's "custom or practice . . . allowed patrolmen to

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[2] When dealing with individual capacity claims, the Court can order a Rule 7(a) reply if it believes the complaint is insufficient to overcome the qualified immunity defense. *See Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir. 1999). Since the section 1983 claim of custom or practice is alleged against the municipality, the qualified immunity defense does not apply, and therefore a Rule 7 reply is not appropriate. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (holding the defense of qualified immunity only applies to public officials and not municipalities); *see Reyes*, 168 F.3d at 161 (noting a Rule 7 reply is a response to a qualified immunity defense). It is important to note that in a previous Order by this Court, claims against Lt. Coleman were dismissed based on qualified immunity. *See* Order Granting Motion to Dismiss (Docket No. 46). However, as discussed above, suits against persons in their individual capacity have different pleading requirements from suits against municipalities. In the previous motion, Plaintiffs did not meet the heightened pleading standard, and instead, the Court found the facts were not sufficient to establish a constitutional violation and survive a qualified immunity defense. In the motion before the Court, Bexar County is "not entitled to the benefit of qualified immunity . . . [therefore Plaintiffs] need not allege violation of a clearly established right." *Meadowbriar*, 81 F.3d at 532 (quoting *Babb v. Doraman*, 33 F.3d 472, 475 n.5 (5th Cir. 1994)).

arbitrarily and unreasonably interfere with county volunteer emergency service." *Pl.'s Original Compl.*, at 20.

Moreover, Plaintiffs allege Bexar County's custom or practice results in patrolmen making arbitrary decisions in emergency medical situations. *Id.* at 25. It appears Plaintiffs argue a constitutional due process violation occurred when Bexar County officials arbitrarily prevented the rescue of persons in known danger. *Salas v. Carpenter*, 980 F.2d 299, 307 (5th Cir. 1992) (noting that officials who arbitrarily prevent the rescue of persons in known danger deny due process if they act with the requisite mental state). Ultimately, it appears Plaintiffs claim is that Bexar County's policy or custom of failing to adequately train and supervise resulted in Plaintiffs' deprivation of medical care. Although this claim was not succinctly expressed in the Amended Complaint, the Court concludes Plaintiffs' claim – which at times amounts to no more than boilerplate language – is sufficient. It is unclear at this stage of the pleadings whether Bexar County has a policy or custom of the actions Plaintiffs allege. However, whether Plaintiffs can prove their claims should be determined after some discovery – and not at this stage of the proceedings. *See Doe*, 81 F.3d at 1401. Bexar County is permitted to file a dispositive motion if it deems it appropriate after the discovery period concludes.

According to the holding in *Leatherman* that section 1983 claims against municipalities only need to satisfy the generic notice pleading requirements of

Rule 8, the Court finds that Plaintiffs' language concerning the existence of a custom or practice must survive Bexar County's Motion to Dismiss. Furthermore, several district courts have held that at the pleading stage plaintiffs do not have to specify the proof on which they base their claim that a policy or custom existed. *Wayne,* 2006 WL 3487022, at *4; *Doucet v. Wadjua,* No. 92-4058, 1993 WL 92527, at *3 (E.D. La. Mar. 22, 1993) (finding a section 1983 claim against the city satisfied the generic pleading notice pleading standard of *Leatherman*); *Jacobs v. Port Police Dept.,* No. 1:94-767, 1996 WL 363023, at *11 (E.D. Tex. June 26, 1996) (finding that boilerplate language regarding custom and practice satisfied the generic pleading standard of *Leatherman.*) *adopted by Jacobs v. Port Police Dept.,* 1:94-767, 1997 WL 470354 (E.D. Tex. June 16, 1997).

At minimum, Plaintiffs' complaint sufficiently alleges Bexar County had a policy or custom of failing to train or supervise that resulted in a deprivation of emergency services. Therefore, Bexar County's Motion to Dismiss is DENIED.

V. Conclusion

For the foregoing reasons, Plaintiffs have sufficiently pleaded their claims against Bexar County to survive Bexar County's Motion to Dismiss based on governmental immunity. Therefore, Bexar County's Motion to Dismiss is DENIED.

It is so ORDERED.

Signed this 11th day of October, 2007.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARY HALE,	§	
WAYNE HALE,	§	
JENNIFER HARRIS,	§	
HAROLD HARRIS, and	§	**No.**
DARRELL SCRAPER,	§	**SA-06-CA-0562-RF**
Plaintiffs,	§	
	§	
v.	§	
KYLE COLEMAN,	§	
Individually, and	§	
BEXAR COUNTY, TEXAS,	§	
Defendants.	§	

ORDER GRANTING MOTION TO DISMISS

(Filed Mar. 21, 2007)

BEFORE THE COURT is Defendant Coleman's Motion to Dismiss (Docket No. 7), filed September 5, 2006. After careful consideration, the Court is of the opinion that the Motion should be GRANTED.

I. Background

At 5:00 a.m. on June 28, 2004, a train carrying chlorine gas derailed near the home of Plaintiffs Wayne and Mary Hale.[1] Alarmed by the noise, Mary

[1] Second Am. Compl., at 3.

Hale reported the crash to a Bexar County 911 operator, who notified the Southwest Volunteer Fire Department (SWFD).[2] Plaintiffs Harold and Jennifer Harris and Darrell Scraper are the SWFD assistant chief, lieutenant, and chief, respectively. The Harrises reached the scene at 5:15 a.m, followed by deputies from the Bexar County Sheriff's Office (BCSO), and then Darrell Scraper.[3] As all approached in darkness, a BCSO patrol unit and a SWFD motor unit drove into a cloud of chlorine gas.[4] The deputy managed to escape, but the firefighter had to be rescued by Harold Harris.[5] In response, BCSO ordered all units to stay clear of the wreckage.[6]

Meanwhile, around 6:00 a.m., Mary Hale made another call to 911, reporting that she and her husband were having trouble breathing and would try to evacuate in their vehicle.[7] Their access to Nelson Road was blocked, however, by a neighbor's locked gate, and they returned home.[8] Around that time, SWFD learned that nearby residents, including the Hales, were trapped.[9] San Antonio Fire

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[2] *Id.* at 4.

[3] *Id.* at 4-7.

[4] *Id.* at 5.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 6.

[8] *Id.*

[9] *Id.* at 7-8.

Department (SAFD) personnel arrived at the scene and were briefed by SWFD. Both groups discussed options for rescuing the Hales.[10] Equipped with bunker gear and self-contained breathing apparatuses, SWFD decided to approach the Hales' residence through a cornfield, upwind from the spill.[11]

The Harrises and Darrell Scraper allege that Defendant Kyle Coleman, a BCSO sergeant, ordered them to stay out of the area.[12] Similarly, the Hales allege that other private rescuers, such as their son, Charles, were prevented from attempting a rescue.[13] Coleman denies these allegations.[14]

When the Hales returned home, they again called 911 and followed instructions to turn off their air-conditioning and rinse in the shower (for decontamination) in preparation for rescue.[15] Both actions increased the humidity inside their home, causing a chemical reaction which produced hydrochloric acid.[16] The 911 operator assured them that help was on the way, and advised them to stay put.[17] The Hales allege that they detrimentally relied on the operator, and

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[10] *Id.* at 8.

[11] *Id.*

[12] *Id.* at 9.

[13] *Id.* at 11-12.

[14] Answer (Docket No. 3), at 3-5.

[15] Second Am. Compl., at 33.

[16] *Id.*

[17] *Id.*

could have either continued self-evacuation efforts or contacted private rescuers.[18]

SAFD finally reached the Hales at 11:30 a.m.[19] The Hales believe they could have been saved as early as 7:30 if Coleman and other deputies had not interfered with SWFD.[20] They allege that, as a result of the delay, they suffered prolonged exposure to chlorine gas and hydrochloric acid.[21] When SAFD arrived, Mary Hale was almost unconscious and near death.[22] Her brother-in-law, who was living with the Hales at the time, died a few months later. Finally, Wayne Hale's mother and step-sister, who lived next door, were dead when help arrived.[23]

II. Claims

Wayne and Mary Hale allege that Coleman and Bexar County, acting under color of state law, arbitrarily and recklessly prevented lifesaving rescue operations without providing alternative aid.[24] They assert that this interference violated their procedural and substantive due process rights, as well their right

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[18] *Id.* at 34.

[19] *Id.* at 32-33.

[20] *Id.*

[21] *Id.* at 33.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 17.

to equal protection of the laws.[25] The Hales allege that Coleman and Bexar County acted pursuant to an official policy or custom, to wit: the city and county failed to adequately train and supervise law enforcement officers not to exceed their authority under the LEPC HAZMAT/WMD Contingency Plan, the Bexar County Emergency Management Plan, and the mutual aid agreement among local government agencies.[26] The Hales allege that they suffered and will continue to suffer physical pain, loss of lung tissue, other symptoms of toxic poisoning, decreased life expectancy, and emotional distress.[27] They seek damages for past and future injuries.

Harold and Jennifer Harris and Darrell Scraper allege a due process right to rescue individuals without arbitrary and unreasonable interference by law enforcement. They also allege a violation of their First Amendment right to freely associate with SWFD.[28] Further, they allege equal protection violations, pointing out that paid city firemen were allowed to perform their duties without interference.[29] Jennifer Harris seeks damages for emotional distress and feelings of guilt in connection with not being able to rescue the Hales and other nearby residents.[30]

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[25] *Id.*

[26] *Id.* at 39.

[27] *Id.* at 35.

[28] *Id.* at 18, 37.

[29] *Id.* at 18, 38.

[30] *Id.* at 36.

Finally, all Plaintiffs seek a permanent injunction prohibiting Bexar County from unconstitutionally interfering with the operations of volunteer fire departments under the same or similar circumstances.[31]

III. Standard of Review

Asserting qualified immunity, Defendant Coleman moves to dismiss under Rule 12(b)(6). The Court must accept all well-pleaded facts as true and view them in the light most favorable to Plaintiffs.[32] However, the Court does not credit conclusory allegations or unwarranted deductions from the facts.[33] The issue at this stage is not whether Plaintiffs will prevail, but whether they are entitled to pursue their complaint and offer evidence in support thereof.[34] Motions to dismiss are disfavored and should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[35]

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[31] Pl.'s Resp. to Def.'s Mot. to Dismiss (Docket No. 31), at 2.

[32] *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

[33] *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

[34] *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1401 (5th Cir. 1996).

[35] *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164 (5th Cir. 1999); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

IV. Analysis

Qualified immunity shields a government official from liability for civil damages arising from his performance of discretionary functions.[36] It applies when official conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[37] Once a defendant asserts qualified immunity, the burden falls to the plaintiff to demonstrate its inapplicability.[38] The Court first determines whether the plaintiff has stated a violation of a clearly established constitutional or federal statutory right.[39] Even if the plaintiff satisfies this prong, the official is entitled to immunity if his conduct was objectively reasonable in light of the law existing at the time of the incident.[40]

A. Wayne and Mary Hale

In their Second Amended Complaint, which totals 46 pages, the Hales contend that Coleman "ordered [SWFD] to get out of the area" and told a fellow BCSO deputy "we just ordered them out of

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[36] *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

[37] *Id.* at 818; *Thompson v. Upshur County*, 245 F.3d 447, 456 (5th Cir. 2001).

[38] *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005).

[39] *Modica v. Taylor*, 465 F.3d 174, 179 (5th Cir. 2006).

[40] *Id.*; *Hare v. City of Corinth*, 135 F.3d 320, 325 (5th Cir. 1998).

here, we already took care of that, and we're not going to allow 'em back in here . . . until the fire command over there . . . tells us they can come back in."[41] This is the full extent of the Hales' factual allegations against Coleman. Although these core pleadings are scant, and Coleman disputes them, they will be accepted as true for purposes of considering a Rule 12(b)(6) motion. On the other hand, the Hales repeatedly allege that law enforcement officers "arbitrarily," "unreasonably," "recklessly," and "callously" interfered with private rescue efforts. They do not articulate any facts supporting such characterizations, and this Court is not required to accept conclusory allegations.

The first prong of the qualified immunity doctrine asks whether the Hales have stated a violation of their clearly established constitutional or federal statutory rights. Based on the pleadings, the issue is whether a person has a right to be rescued by private volunteers without delay caused by law enforcement officers responding to an emergency.

Seeking to state a due process claim, the Hales rely on *Colson v. Grohman*, which held that an elected city council member did not present a viable First Amendment claim against city officials who retaliated against her because of her political views.[42] The Hales cite to a portion of the opinion stating the

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[41] Second Am. Compl. at 15-16.

[42] *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999).

general rule that the government may not condition public benefits, including employment, on the basis of a person's speech, beliefs, or political affiliation.[43] The Hales also cite to *Perry v. Sindermann*, which held that a state college professor who lacked tenure raised viable free speech and due process claims when his contract was not renewed, allegedly because of his public criticism of the school.[44] The facts and legal issues in *Colson* and *Perry* are so dissimilar from those in this case that the Court does not consider them authoritative on the question presented in Coleman's Motion.

In contrast, the Court finds significant guidance in *Salas v. Carpenter*, which reversed the trial court's denial of Rule 12(b)(6) motion asserting qualified immunity.[45] In that case, a woman was taken hostage in the Tarrant County Courthouse. The Fort Worth Police Department sent snipers, a SWAT team, and hostage negotiators to the scene, but the county sheriff required them to leave, claiming that courthouse security was within his exclusive jurisdiction.[46] Lacking similar resources, the sheriff nonetheless attempted to handle the situation. Several hours later, the captor killed himself and the woman.[47] Her

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[43] *Id.*

[44] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[45] *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992).

[46] *Id.* at 302.

[47] *Id.* at 303.

survivors brought suit under section 1983, alleging that the sheriff violated her due process rights by preventing the Fort Worth Police from effectuating her release.[48] After examining several cases involving similar facts, the court concluded that the sheriff did not deprive the woman of due process.[49]

Salas and other authorities supply a handful of controlling principles. First, it is clear that "the due process clause is not implicated by a negligent act of an official which causes unintended loss of or injury to life, liberty, or property."[50] Instead, the test is whether the official's conduct was so egregious as to "shock the conscience."[51] When law enforcement officers respond to an emergency, egregious conduct typically entails the intent to harm.[52] Stated differently, unless the government creates the danger or takes some affirmative action to exacerbate it, "the

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[48] *Id.*

[49] *Id.* at 308-09.

[50] *Id.* at 306 (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986)); see also *Davidson v. Cannon*, 474 U.S. 327, 330 (1986) ("lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent"); *McClendon v. City of Columbia*, 305 F.3d 314, 326 (5th Cir. 2002) (liability for negligence "is categorically beneath the threshold for constitutional due process.").

[51] *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998); *Carter v. Simpson*, 328 F.2d 948, 952 (7th Cir. 2003).

[52] *County of Sacramento*, 523 U.S. at 849; *Carter*, 328 F.3d at 952; *see also Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) (citing *Graham v. Connor*, 490 U.S. 386 (1989)).

Constitution imposes no duty on states to provide protective services or otherwise prevent violence by private actors."[53]

Second, a violation of due process may occur in some emergency situations where officials cut off *all* avenues of rescue without providing an alternative.[54] In *Ross v. United States*, a deputy sheriff prohibited civilians, firefighters, and a police officer from entering a lake to rescue a drowning boy.[55] The deputy asserted a county policy that only fire department divers could enter the water.[56] The court determined that his conduct was egregious because he knew that the boy had been underwater for several minutes and could die at any moment without immediate help, yet he cut off all rescue efforts without providing an alternative.[57]

In *Salas*, the court distinguished *Ross* by noting that the Tarrant County sheriff "did not use his authority as a state officer to prevent any rescue, rather he exercised his authority to replace one

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[53] *Salas*, 980 F.2d at 306 (citing *DeShaney v. Winnebago Cty. Dept of Social Servs.*, 489 U.S. 189 (1989)); *see also Escamilla v. City of Santa Ana*, 796 F.2d 266, 270 (9th Cir. 1986) and cases cited therein.

[54] *Salas*, 980 F.2d at 308.

[55] *Ross v. United States*, 910 F.2d 1422, 1433 (7th Cir. 1990).

[56] *Id.* at 1424-25.

[57] *Id.* at 1432.

rescue effort with another."[58] Although the sheriff arguably placed the hostage in a worse position than if he had not acted at all, he did not increase her vulnerability to the danger in a constitutional sense.[59]

Third, courts must remember that "an important policy behind qualified immunity is to prevent litigation which will unduly inhibit officials in the discharge of their duties. Second-guessing the decisions of law enforcement officers regarding the choice of police personnel in a crisis would undermine that policy."[60] Most courts confronting alleged mistakes committed by law enforcement officers in emergency situations have declined to recognize due process violations.[61]

Applying these principles, the Hales have failed to state a due process claim. Coleman neither caused

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[58] *Salas*, 980 F.2d at 308.

[59] *Id.* at 309; *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 197 (1989).

[60] *Id.* at 311.

[61] *See, e.g., Lansdown v. Chadwick*, 258 F.3d 754, 757 (8th Cir. 2001) (county law enforcement did not allow firefighters to rescue individual in burning house); *Radecki v. Barela*, 146 F.3d 1227, 1229 (10th Cir. 1998) (deputy sheriff instructed man to assist in subduing suspect, whereupon man was shot and killed); *Jackson v. City of Joliet*, 715 F.2d 1200, 1205-06 (7th Cir. 1983) (police officer directed traffic away from burning vehicle without calling ambulance or rescuing occupants); *Escamilla v. City of Santa Ana*, 796 F.2d 266, 268 (9th Cir. 1986) (undercover police officer failed to subdue armed bar patron before bystander was shot and killed in fight).

the derailment, nor did anything to affirmatively exacerbated the danger. Further, he provided for the Hales to be rescued by SAFD. Thus, this case is similar to *Salas*, where the sheriff exercised his authority to replace one rescue effort with another. Despite their horrifying experience, the Hales simply have not alleged any facts indicating egregious official conduct or an abuse of authority with the intent to injure. The Fourteenth Amendment does not punish negligence committed by law enforcement officers responding to an emergency in a dangerous environment and on the basis of uncertain information.

The Hales purport to bring an equal protection claim, but their Complaint is devoid of any supporting factual allegations or legal authority. The equal protection clause generally requires the government to treat similarly situated people alike.[62] This Court may conduct an equal protection analysis "only if the challenged government action classifies or distinguishes between two or more relevant groups."[63] The Hales, however, do not allege that Coleman treated them differently from other individuals, nor that they are members of a suspect class, nor that Coleman purposefully discriminated against them or sought to prevent them from exercising a

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[62] *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996).

[63] *Id.*

fundamental right.[64] Accordingly, the Hales have not stated a clearly established violation of their equal protection rights.

This Court does not doubt that the Hales suffered physical injury and agony from the unfortunate events of June 28, 2004. Further, the Court expresses no opinion concerning whether Coleman properly handled the situation. Nonetheless, the Hales have not carried their burden to state a claim against Coleman for the violation of a clearly established constitutional or federal statutory right. Because Coleman is entitled to qualified immunity, his Motion to Dismiss must be GRANTED.

B. Harold and Jennifer Harris and Darrell Scraper

Harold and Jennifer Harris and Darrell Scraper ("the firefighters") allege due process, First Amendment, and equal protection claims. Their allegations require this Court to determine whether private volunteers have a clearly established constitutional or federal statutory right to provide emergency rescue services without interference from law enforcement.[65]

Starting with the due process claim, the right to earn a livelihood in a lawful occupation, free from unreasonable governmental interference, is protected

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[64] *See DeShaney*, 489 U.S. at 197 n.3.

[65] Second Am. Compl., at 30.

by the liberty and property concepts of the Fifth Amendment.[66] In this case, however, it is undisputed that the firefighters serve as non-paid volunteers.[67] Because volunteer work does not provide citizens with their economic livelihood, it is not protected by due process.[68] This rule applies even though the volunteer may receive benefits, such as training, reimbursement for expenses, and workers' compensation.[69]

The firefighters rely on *Cowan v. Corley*.[70] In that case, the county sheriff formed a wrecker association, promulgating rules for participation and collecting membership fees.[71] After joining, the plaintiff complained that the sheriff was giving preferential treatment to other members. Without notice or a hearing, the sheriff expelled the plaintiff, effectively shutting down his business.[72] On appeal, the court did not decide whether the plaintiff stated a viable

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[66] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *United States v. Robel*, 389 U.S. 258, 264 (1967); *Bolton v. City of Dallas*, 472 F.3d 261, 263-64 (5th Cir. 2006).

[67] Second Am. Compl., at 27.

[68] *Versarge v. Township of Clinton*, 984 F.2d 1359, 1370-71 (3d Cir. 1993); *Hyland v. Wonder*, 972 F.2d 1129, 1141 (9th Cir. 1992); *Auchinleck v. Town of LaGrange*, 30 Fed. Appx. 640, 642 (7th Cir. 2002).

[69] *Versarge*, 984 F.2d at 1370.

[70] *Cowan v. Corley*, 814 F.2d 223, 227 (5th Cir. 1987).

[71] *Id.* at 225.

[72] *Id.*

constitutional claim; it held only that the trial court's Rule 12(b)(6) dismissal was premature.[73]

Whereas the plaintiff in *Cowan* owned a profitable business, the firefighters are non-paid volunteers. Whereas the plaintiff in *Cowan* was fully prohibited from operating his wrecker service, the firefighters were prevented, on just one occasion, from performing one task for which they are trained. Perhaps most importantly, the court in *Cowan* did not determine whether the plaintiff stated a due process claim. Thus, *Cowan* is neither factually germane nor legally authoritative to the present case. In sum, the Court is of the opinion that the firefighters have failed to state a due process claim.

With respect to the First Amendment claim, it is clear that the Constitution protects expressive association.[74] While a group need not associate exclusively or primarily for the purpose of disseminating a certain message, it must engage in some expressive activity that was or is impaired by government

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[73] *Id.* at 228.

[74] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Hurley v. Irish-American Gay Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984).

action.[75] Conduct that is tantamount to symbolic speech is protected if it is "inherently expressive."[76]

In the Second Amended Complaint, the firefighters do not allege that SWFD engages in expressive activity generally, nor that its rescue operations qualify as inherently expressive conduct. Because there is no basis for concluding that the firefighters enjoy an expressive association, they have failed to state a First Amendment claim against Coleman.

Finally, the firefighters raise an equal protection challenge, alleging that Coleman discriminated against SWFD by allowing SAFD to rescue the Hales. Under the equal protection clause, a government classification that neither burdens a fundamental right nor targets a suspect class is upheld so long as it bears a rational relation to some legitimate government goal.[77] The firefighters, however, do not claim to be the victims of any classification. Instead, they present an "as applied" challenge to specific action. This type of claim is analyzed under the "selective enforcement" framework.[78] A selective

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[75] *Boy Scouts of Am.*, 640 U.S. at 655.

[76] *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 126 S.Ct. 1297, 1310 (2006); *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

[77] *Sonnier v. Quarterman*, 476 F.3d 349, 368 (5th Cir. 2007); *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir. 1999).

[78] *Bryan v. City of Madison*, 213 F.3d 267, 277 (5th Cir. 2000);

enforcement case arises when a government official selectively exercises his powers against a particular party.[79] To state a claim, the plaintiff "must prove that the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right."[80] Thus, the analysis returns to the question of whether the government engaged in purposeful discrimination or selectively infringed on fundamental rights.

The firefighters do not assert that they are members of a suspect class, nor do they allege the violation of a fundamental right besides freedom of expressive association. Because they articulate no facts suggesting that Coleman acted on some improper motive, the firefighters have not stated an equal protection claim.

In sum, the firefighters have not carried their burden to state a claim against Coleman for the violation of a clearly established constitutional or federal statutory right. Coleman is entitled to qualified immunity, and his motion to dismiss must be GRANTED.

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[79] *Id.* (citing *Willowbrook v. Olech*, 528 U.S. 562 (2000)).

[80] *Id.* (citing *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999)); *United States v. Sage Pharm., Inc.*, 210 F.3d 475, 480 (5th Cir. 2000).

V. Conclusion

Defendant Coleman's Motion to Dismiss is GRANTED. All claims raised against Defendant Coleman in this suit are DISMISSED WITH PREJUDICE.

It is so ORDERED.

Signed this 21st day of March, 2007.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50820

MARY HALE; WAYNE HALE;
JENNIFER HARRIS; HAROLD HARRIS;
DARRELL SCRAPER

Plaintiffs-Appellants

v.

BEXAR COUNTY, TEXAS

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

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ON PETITION FOR REHEARING EN BANC

(Filed Aug. 24, 2009)

(Opinion ___ 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, DAVIS, and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG6A